Bouley, Inc., d/b/a Bouley *and* Hotel Employees and Restaurant Union, Local 100, of New York, New York and Vicinity, AFL–CIO. Case 2–CA–23851

February 26, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 29, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent and the General Counsel filed exceptions and a supporting brief, the Respondent filed a motion to reopen the record and an answering brief, and the General Counsel filed a brief in opposition to the Respondent's exceptions and motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We affirm the judge's findings that the Respondent unlawfully interrogated an employee about union activities and unlawfully threatened to close the restaurant. We find merit, however, in the Respondent's exceptions to the judge's finding of an 8(a)(4) and derivative 8(a)(1) violation based on David McGrath's discharge because those violations were not alleged in the charge or complaint nor litigated at the hearing. Accordingly, we reverse the judge's 8(a)(4) and (1) findings.[2]

With respect to McGrath's discharge, the complaint alleges only that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to him on September 12, 1989,[3] and by thereafter discharging him in retaliation for his known union organizing activities. The Respondent's answer asserts, inter alia, that it terminated McGrath for lawful, nondiscriminatory reasons. Neither the General Counsel's theory of the case, nor the Respondent's asserted defense, addresses the issue of whether McGrath's discharge violated Section 8(a)(4) of the Act, which protects employees against discharge or discrimination for filing charges or giving testimony under the Act.

Undisputed evidence adduced at the hearing shows that McGrath, the initiator of a contemporaneous union organizing campaign among the Respondent's restaurant employees, received a written disciplinary warning from his supervisor, Maitre d' Olivier Daubresse, on September 12. The next day McGrath delivered the following letter to the Respondent:

> My lawyer is looking at the letter of reprimand from Olivier wherein he claims I called him an ''asshole.'' I totally deny this charge and hope that Olivier has witnesses other than persons on the management team to verify this claim.
>
> I will not stand by and have my character assassinated without pressing charges . . . both against the restaurant and Mr. Olivier.
>
> I will accept a retraction within 24 hours with the assurance that Mr. Olivier . . . will end his persecution campaign against me or I will find it necessary to subpoena the entire service staff to verify the reality of his actions towards me in the past few weeks.

David Bouley testified that McGrath's discharge on September 14 was based solely on his ''gross insubordination'' as manifested in the above-quoted letter.

The Judge's Decision

The judge found, and we agree, that the General Counsel failed to prove either that McGrath's written warning or his discharge was motivated by antiunion considerations, despite his crediting testimony showing that Bouley had prior knowledge of McGrath's union activities. However, the judge, citing *Garment Workers*, 295 NLRB 411 (1989), sua sponte advised the parties after the hearing to brief McGrath's discharge as an 8(a)(4) and (1) issue in that, based on the text of his September 13 letter, the discharge may have been motivated by a perception that McGrath would file charges with the Board. Following the submission of the parties' briefs,[4] the judge found, based on the existing record, that the purported insubordinate conduct for which McGrath was discharged was an intention to file Board charges. The judge concluded that the discharge therefore violated Section 8(a)(4) and (1). In so holding, the judge noted that, although the letter did not explicitly state that McGrath intended to file charges under the Act, Bouley clearly was aware that ''pressing charges'' meant filing unfair labor practice charges, because Bouley knew of McGrath's union activity and Bouley was familiar with NLRB proce-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In light of our disposition of the 8(a)(4) and (1) discharge findings, we find it unnecessary to pass on the Respondent's motion to reopen the record.

[3] All dates are 1989.

[4] The Respondent's brief to the judge requested reopening the hearing for consideration of additional evidence on these issues. The judge denied this request.

dures as a result of his settlement of 8(a)(3) allegations filed against the Respondent a year earlier. The judge relied on *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130, 135 (2d Cir. 1990), as authority for his finding that McGrath's discharge violated Section 8(a)(4) and (1), even though only Section 8(a)(3) and (1) was alleged, because both theories focus on the legality of the Respondent's motivation.

Contentions of the Parties

The Respondent, in its exceptions and motion to reopen the record, reiterates that it had no notice or opportunity to present evidence and related legal argument on whether McGrath's threat to ''press charges'' implicated Section 8(a)(4) and (1), because that theory was neither alleged nor litigated.[5] The Respondent contends that it cannot be expected to raise, nor should it be penalized for failing to raise, a defense to a claim of which it has never received notice, citing *Quality C.A.T.V. v. NLRB*, 824 F.2d 542 (7th Cir. 1987).

The General Counsel's opposition to the Respondent's exceptions and motion urges that unless it can be shown that the Respondent was precluded from offering exculpatory evidence or that it would have changed its conduct at the hearing as a result of notice of the 8(a)(4) allegation, the Respondent has not shown a denial of its due process rights. The General Counsel contends that the Respondent had notice of the critical importance of whether McGrath's letter was the cause of his discharge and that the degree to which this had been fully litigated is manifested by its attorney's extensive questioning of McGrath and Bouley on the subject of the letter.

Discussion

We conclude that the judge's 8(a)(4) and (1) discharge finding was improper. Because no 8(a)(4) or (1) theory for McGrath's discharge was alleged in the complaint or advanced at the hearing, the Respondent had no notice or opportunity to prepare and present a defense to it. If Respondent had known during the hearing that an 8(a)(4) issue was involved, it would have had an opportunity to present evidence as to (1) whether Respondent's representatives perceived that the references to ''pressing charges'' and ''subpoenas'' reflected an intention to resort to the Board; and (2) whether these references in the letter were the motive for the discharge. Respondent was not given this opportunity because the judge injected the 8(a)(4) issue into the case after the close of the hearing. In addition, the judge denied Respondent's motion to reopen the record to receive a defense to the 8(a)(4) contention.[6] Thus, it is clear that the judge's finding of an 8(a)(4) and (1) violation in these circumstances constitutes a prejudicial denial of due process to the Respondent.

Our dissenting colleague asserts that ''notice of an 8(a)(3) discharge complaint is closely connected to an 8(a)(4) finding'' inasmuch as both involve the issue of motivation. However, the fact is that Section 8(a)(3) and (4) are different allegations which raise different issues presented by different defenses. Indeed, our colleague would remand this case to receive further evidence on the 8(a)(4) issue event though the 8(a)(3) issues were fully litigated.

This case is markedly differently from *Pergament*, supra, on which the judge relied. In *Pergament*, the respondent *admitted* that it failed to hire its licensee's former employees because unfair labor practice charges had been filed, and the Board therefore concluded that the alternative 8(a)(4) theory was fully litigated. No such admission is present in this case. The Respondent's chief witness in the instant case merely testified that he discharged McGrath for his insubordinate conduct, in the form of McGrath's September 13 letter, and that such conduct, rather that union activity, was the basis for his discharge. It is true that the letter's contents are such that the Respondent could have understood the letter as a threat to file an unfair labor practice charge. However, Respondent certainly did not admit that this was so. The Respondent had no reason to adduce additional evidence at the hearing as to its understanding of the letter's language, because at no time during the hearing did the General Counsel allege or argue an 8(a)(4) theory of violation. As noted above, the General Counsel spoke solely in terms of union activities, and, indeed, expressly relied on a provocation theory like that set forth in *Spartan Equipment*, 297 NLRB 19 (1989). More particularly, the contention was that McGrath's letter—even assuming that its contents would form a lawful basis for discharge—was the result of an employer provocation that was itself motivated by antiunion discrimination, and that a discharge based on the letter was therefore unlawful as the result of prior discrimination in violation of Section 8(a)(3).[7]

[5] Affidavits attached to the Respondent's motion proffer testimony by David Bouley and the Respondent's corporate counsel regarding Bouley's understanding of McGrath's letter as being accusatory and insulting rather than indicative of an intention to file charges with the Board.

[6] See *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988).

[7] An affidavit by the Respondent's counsel, attached to its motion to reopen the record, asserts that he was advised by the General Counsel prior to trial that the 8(a)(3) complaint was premised on this theory.

Although, as the General Counsel now points out, the primary holding of *Spartan Equipment* was that the discharge was unlawful because it was premised on a threat to file a legal action, the General Counsel did not advert to this holding until the filing of her opposition to the Respondent's motion to reopen the record. Both at the hearing and in her posthearing brief to the judge, she characterized McGrath's conduct in writing the letter solely in terms of his

Based on the above, we would not find an 8(a)(4) violation on the present record. Thus, the only issue left for resolution is whether this case should be remanded. We would not do so. In our view, the General Counsel, having chosen to proceed exclusively on an 8(a)(3) theory, without so much as a hint of reliance on the possibility of an 8(a)(4) violation based on McGrath's September 13 letter, should not be given a posthearing opportunity to recast the theory of the case. A remand to ''cure'' the denial of due process would unnecessarily give the General Counsel another bite at the apple.[8]

The dissent asserts that Respondent would be the beneficiary of a remand. This assertion begs the issue. *If* the dissent were correct in its contention that the General Counsel should be given an opportunity to make a belated 8(a)(4) contention, then Respondent would indeed ''benefit'' from a remand that would give it an opportunity to present a defense to the 8(a)(4) contention. However, *the issue* is whether the General Counsel should be permitted to make the belated contention. As discussed above, we would not permit the General Counsel to do so. Accordingly, we shall dismiss the judge's 8(a)(4) and (1) discharge findings, and make the appropriate modifications to his recommended Order and notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Bouley, Inc., d/b/a Bouley, New York City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order, as modified.

1. Delete paragraphs 1(a), and 2(a), (b), and (c) from the Order and reletter the remaining paragraphs.

2. Substitute the attached notice for that of administrate law judge.

CHAIRMAN STEPHENS, dissenting in part.

Although I agree with my colleagues that the Respondent's interrogation and threat violated Section 8(a)(1), I cannot join in their decision to reverse the judge and dismiss the 8(a)(4) and (1) violations relating to McGrath's discharge. Unlike my colleagues, I would remand and reopen this proceeding, in accordance with the Respondent's request, to avoid any further contention by the Respondent that it has not been accorded a full opportunity to provide a defense to the determinative issues in this proceeding.

Notice of an 8(a)(3) discharge complaint is closely connected to an 8(a)(4) finding at least to the extent that both go to the critical issue of the Respondent's motivation. *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130, 135 (2d Cir. 1990).[1] It is particularly so in this case where the Respondent's defense to the discharge allegation consisted of the following testimony by Bouley in response to his own counsel's questions: (1) that he found McGrath's letter ''a threatening letter [containing] language that I'm not familiar with,'' e.g., the phrase ''To subpoena the staff,'' (2) that he faxed the letter to, and discussed it with, his corporate attorney prior to discharging McGrath, and (3) that he would not have discharged McGrath on September 14 were it not for that letter.[2] It was the judge's evaluation of the specific language of McGrath's letter and Bouley's admitted reaction thereto,[3] which led him to find that the Respondent understood McGrath's reference to ''pressing charges'' as a threat to file unfair labor practice charges,[4] and that it discharged him for that reason in violation of Section 8(a)(4) and (1).

In my view, the judge's finding reflects a reasonable judgment that the General Counsel has established a violation of Section 8(a)(4) and (1). However, as the Respondent contends it was deprived of a full opportunity to defend its discharge of McGrath on the basis of the contents of the September 13 letter, I would remand this proceeding for the consideration of any other relevant information which the Respondent may introduce to explain the basis for McGrath's discharge.[5] Accordingly, I would grant the Respondent's motion and reopen the record for that purpose.

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union activity and made no reference at all to any threat to invoke Board processes.

[8] See *Waldon, Inc*., 282 NLRB 583 (1986). The dissent attempts to distinguish *Waldon* on the basis that the letter was introduced into evidence and ''speaks for itself.'' However, the fact is that the letter does not establish that Respondent understood ''charges'' and ''subpoenas'' to relate to an intention to resort to the NLRB and does not establish that the discharge was based on that understanding. Indeed, these matters were not even litigated.

[1] See also *Grand Rapids Die Casting v. NLRB*, 831 F.2d 112, 118 (6th Cir. 1987); *AMC Air Conditioning Co*., 232 NLRB 283 fn. 10 (1977); *Coca Cola Bottling of Buffalo*, 811 F.2d 872 (2d Cir. 1987).

[2] Contrary to the majority, I find *Waldon, Inc*., 282 NLRB 583 (1986), inapplicable in these circumstances. In that case, no evidence of the unalleged violation had been adduced, whereas here the documentary and testimonial evidence discussed above constitute the underpinning of the judge's finding.

[3] See *NLRB v. Jones Dairy Farm*, 909 F.2d 1021, 1028–1029 (7th Cir. 1990) (no due process problem where respondent cited a zipper clause in its defense and Board found that clause established, rather then refuted, unfair labor practice allegation).

[4] The Board interprets such statements broadly, e.g., *Oakes Machine Corp*., 288 NLRB 456, 457 (1988) (an intention to testify ''in court'' if necessary); *Lustrelon, Inc*., 289 NLRB 378, 383 (1988) (''going to go to the U.S. Labor Department and complain what they were doing to [him]''); *Book Covers Inc*., 276 NLRB 1488, 1490–1491 (1985) (he was going to the Labor Department). See also *NLRB v. AA Electric Co*., 405 U.S. 117, 122 (1972) (discharge of four employees for giving statements to a Board field examiner).

[5] Unlike my colleagues, I view a remand for further hearing as a benefit for the Respondent rather then a second bite for the General

Continued

Counsel, because without any further evidence from the Respondent then it has thus far adduced I would affirm the judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate any employee about union support or union activities.

WE WILL NOT threaten to close our business because of the union activities of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

BOULEY, INC., D/B/A BOULEY

Margit Reiner Esq., for the General Counsel
Jerrold Goldberg, Esq. (Epstein, Becker & Green, P.C.), for the Respondent.
Harold Ickes, Esq. (Meyer, Suozzi, English & Klein, P.C.), for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York City on May 22 and 23, l990. The original charge, filed on September 20, l989, alleged that the Respondent violated Section 8(a)(l) and (3) of the Act when it discharged David McGrath on September 14, l989, because of his support or membership in the Union, or because he ''exercised other rights protected by the . . . Act.'' A first amended charge was filed on October 31, l989. In addition to repeating the allegation regarding the discharge of McGrath, the amended charge also alleged that on September 12, l989, the Respondent issued a written warning to McGrath because of his support or activities on behalf of the Union. On April 16, l990, the Union filed a second amended charge alleging that the Respondent violated Section 8(a)(1) and (3) of the Act. Realleging the previous allegations regarding McGrath, the amended charge also contended that the Respondent violated the Act when in September and October l989, it solicited employee grievances and when, in November l989, it threatened to close the restaurant if the Union won an election.

The complaint was issued on April 23, 1990. In essence, it alleged:

l. That the Respondent on September 12, l989, issued a warning to David McGrath because of his union activity.

2. That the Respondent on September 14, l989, discharged McGrath because of his union activity.

3. That the Respondent interrogated employees concerning their union activity.

4. That the Respondent solicited employee grievances and impliedly promised to remedy them.

5. That the Respondent threatened to close.

The Respondent denied the allegations of the complaint and contended that the allegations contained in paragraphs 3, 4, and 5 above, were untimely under Section 10(b) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISCHARGE OF DAVID MCGRATH

This same Union unsuccessfully tried to organize the employees of the Respondent in early l988. In February l988, the Union filed a petition for an election. Also, in l988, there was an unfair labor practice charge filed against the Respondent involving the discharge of another employee. That charge was resolved through an informal settlement containing a nonadmissions clause.

The prior proceedings before the Board are not in any way considered by me as evidence of antiunion animus. Rather, they are mentioned because the Respondent by virtue of those proceedings retained labor counsel, and was familiar with some of the types of proceedings that may take place before the Board. It certainly was aware of what an unfair labor practice charge was.

David McGrath was hired as a waiter in November l988. Therefore he had nothing to do with the prior attempt by the Union to organize the employees. McGrath came to the restaurant after being employed by a number of other fancy restaurants. Notwithstanding the testimony of David Bouley that his service was not fully satisfactory, McGrath was, in or about April or May l988, promoted to a position of captain.[1] (Bouley is the chef and one of the principal owners of the restaurant.)

[1] When viewing the record in this case, it should be kept in mind that the Respondent is rated by the New York Times as a four star restaurant. Thus, standards for service are expected to be correspondingly higher than at most other New York restaurants.

According to McGrath and Sous Chef Susan Dayton, they and other employees began talking about a union in May or June l989. However, there does not appear to be any evidence that management knew of this talk. No effort was made to obtain union representation until August l989.[2]

In early June l989, Bouley hired Olivier Daubresse to be the new maitred and Sommelier. Although Daubresse is a young man, his hotel and restaurant background is impressive. One of the reasons that Daubresse was hired, was to shape up the service which Bouley thought was a bit sloppy.

It is conceded by McGrath that from the moment that Daubresse was hired he was criticized by the latter more than any of the other captains and waiters. Coming in for particular criticism was the way McGrath poured wine and the assertion that his service was too rushed.[3]

McGrath took his vacation during the month of July l989. According to Daubresse and Bouley, they discussed in July whether to have McGrath come back to work. They testified that although Bouley wanted Daubresse to hire someone else, a replacement was not found because other waiters would be taking their vacations in August and McGrath would be needed.

On or about August 7, l987, McGrath called Albert Stephenson of the Union. Stephenson explained the Union's benefits and told McGrath that the Union had recently tried to organize the employees of the Respondent. About a week later Stephenson mailed union authorization cards to McGrath and McGrath proceeded to solicit employees to sign them. McGrath handed out union cards in August and September.

According to Dayton and McGrath, Bouley's attitude toward McGrath changed for the worse in August l989. From about August 10, to September 5, l989, Daubresse was away from the restaurant on his vacation.

Dayton testified that on an occasion at the beginning of September, she was about to enter the downstairs office when she overheard Bouley on the phone saying that McGrath was handing out union slips. (Bouley denies having any knowledge of McGrath's union activities until after his discharge.)

According to Daubresse, at the daily meeting on September 11, l989, he told the staff that lobster was not available and therefore no one should take such an order. He states that later in the day, he criticized McGrath for taking a lobster order and also for spilling wine. According to Daubresse, McGrath thereupon called him an asshole and stepped on his shoes. Daubresse states that when he told Bouley that he wanted to fire McGrath, Bouley told him to issue a warning instead. McGrath denies that he cursed at Daubresse or stepped on his shoes. He does state that Bouley did speak to him about spilling some wine and did criticize him for taking a lobster order.

On September 12, l989, Daubresse handed McGrath a written warning which read:

> On the night of September 11, l989, the nightly service staff meeting was conducted at which time it was announced that the ''lobster special' would not be available that evening. During the course of service I noticed that the table cloth on table #34 had many stains of red wine. Upon inquiring about the stains you ignored my question and walked away. You later proceeded to take an order for the ''lobster special'' which was not available. I questioned you as to why such an order was taken at which time you became very defensive and called me an ''asshole.''
>
> Your actions were clearly acts of insubordination to management and is grounds for dismissal. Please be advised that this letter serves as a warning to you that any further display of insubordination will result in termination.

After being handed this warning, McGrath asserted that it was not true that he called Daubresse an asshole. He also indicated that as far as he understood, the lobsters were brought up at the daily meeting so as to sell them. McGrath refused to sign the document and retained it in his possession.

On September 13, l989, McGrath delivered a letter to the Respondent which, in pertinent part, read as follows:

> My lawyer is looking at the letter of reprimand from Olivier wherein he claims I called him an ''asshole.'' I totally deny this charge and hope that Olivier has witnesses other than persons on the management team to verify this claim.
>
> I will not stand by and have my character assassinated without pressing charges . . . . both against the restaurant and Mr. Olivier.
>
> I will accept a retraction within 24 hours with the assurance that Mr. Olivier . . . will end his persecution campaign against me or I will find it necessary to subpoena the entire service staff to verify the reality of his actions towards me in the past few weeks.

After Bouley received the above letter, he called his corporate lawyer and then discharged McGrath on September 14. In this respect, Bouley testified that but for the receipt of this letter, McGrath would not have been discharged at that time.

III. THE OTHER ALLEGATIONS

Employee Jacques Williams credibly testified that around September 17, l989 (after the discharge of McGrath), Bouley asked him which kitchen employees were involved in union activity. When Williams made no reply, Bouley said that a union would be detrimental to the kind of restaurant that he wanted run.

Williams also testified that in November l989, Bouley held a meeting with the entire staff and said that the Union would be detrimental. Williams testified that when Bouley asked the kitchen staff about grievances, the employees complained that the work load was heavy and that a 6-day week was too long. According to Williams, Bouley responded that he was trying to to make a 5-day schedule. In response to a leading question, Williams also testified that subsequent to this meet-

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[2] Although the evidence shows that Dayton probably was a supervisor within the meaning of the Act, the evidence also shows that she actively solicited on behalf of the Union. Accordingly, her knowledge of union activities is not attributed to management.

[3] Daubresse testified that after criticizing McGrath on several occasions, McGrath said that Daubresse was too young to be explaining things to him.

ing, a couple of employees (unnamed) were changed to a 5-day schedule.

Employee Jay Cohen testified that at a full staff meeting, Bouley said that the Union wasn't a panacea and that he was open to the idea of the kitchen staff having a representative to list grievances. Cohen recalled that during a question and answer period, one of the employees reminded Bouley that back in January there had been a discussion about changing from a 6-day to a 5-day schedule. Cohen also testified that at this meeting one of the kitchen employees suggested that he would be the person who would work on a list of grievances.

With respect to the work schedule question, Cohen testified that at a staff meeting in January l989 (well before any union activity), Bouley said that he wanted to work out a 5-day schedule. Cohen further stated that some of more senior kitchen people including himself, had gone to a 5-day schedule before September l989, and that as far as he knew, no one had their schedules changed from the date of the October meeting through the date of the election which was on November 17, 1989.

Cohen further testified that on one occasion in October l989, Bouley, possibly in the presence of Ray Bradley, stated in a flippant manner that he was fed up with the proceedings, the expensive lawyers and giving statements to the NLRB. According to Cohen, Bouley then said that he would just as soon close as have a union. Cohen states that he did not think that Bouley meant that he would actually close the restaurant, and that the comment did not influence his vote in the election.

Regarding the alleged threat to close, Bouley recalled discussing the Union with Bradley, a close friend for 26 years, and saying that all this business destruction was not worth it and that it was difficult to run a restaurant on those terms. Bouley testified that he did not remember saying that he would close the restaurant.

On November 17, l989, an election was held and the Union lost.

IV. DISCUSSION

The Respondent contends that it did not discharge McGrath because of his membership or support of the Union. Rather it asserts that it discharged him because of his ''gross insubordination.'' Indeed, the Respondent demonstrated that the proximate cause of McGrath's termination was the receipt of the letter he wrote on September 13, l989. And in this respect, the evidence shows that but for the writing of this letter, McGrath would not have been discharged. Assuming that I adopt all of the facts relied on by the Respondent in defence of the decision to discharge McGrath, I must therefore conclude that it violated Section 8(a)(1) and (4) of the Act.

Section 8(a)(4) of the Act prohibits an employer from discharging or otherwise discriminating against any employee because he has filed charges or given testimony under the Act. This provision of the Act has been interpreted to bar discrimination against an employee who is discharged because of his or her threat to file a charge under the Act. *Grand Rapids Die Casting*, 279 NLRB 662, 667 (1986), enfd. 831 F.2d 112 (6th Cir. l987). Further, even if there is some ambiguity as to whether the intent is to file an unfair labor practice charge, there will be a violation of the Act if it is concluded that the Respondent understood or interpreted the employee's statement as a threat to file a charge under the National Labor Relations Act. *Garment Workers of America*, 295 NLRB 411, 414 (1989). Finally, such conduct, in addition to being violative of Section 8(a)(4) constitutes an independent violation of Section 8(a)(1) of the Act. *Garment Workers*, supra.

In the present case, after receiving a written warning, McGrath wrote a letter to the Respondent on September 13, l987, wherein he stated that his lawyer was looking into the reprimand and that he would not stand by without pressing charges against the restaurant and Bouley.

Although the letter does not explicitly state that McGrath intended to file charges under the National Labor Relations Act, it seems to me that Bouley understood that this was what McGrath was talking about. For one thing, I credit the testimony of Dayton that in early September she overheard Bouley talking on the phone about McGrath's solicitation of union cards. Second, Bouley was no stranger to Board proceedings as he was involved in a previous election campaign and had settled a prior unfair labor practice charge back in l988. Thus, Bouley was not a novice to Board proceedings and it seems to me that he clearly was aware that ''charges'' means unfair labor practice charges. Accordingly, it is my opinion that the gross insubordination relied on by the Respondent in discharging McGrath was his threat to file charges. Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (4) in this regard. Respondent argues that the Board is precluded from finding an 8(a)(4) violation because such an allegation was neither alleged in the charge or the complaint. This argument is rejected. In *Pergament United Sales*, 296 NLRB 333 (1989), the Board held that the Respondent violated Section 8(a)(4) even though there was no 8(a)(4) allegation in the complaint and even though the administrative law judge had dismissed the 8(a)(3) allegation. In pertinent part the Board stated:

> It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.
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> With respect to the connection between the 8(a)(4) and 8(a)(3) allegations, both allegations focus on the same set of facts, i.e., the lawfulness of the Respondents' motivation for failing to hire the employees. In this regard, the ultimate issue in both allegations is the same: whether the Respondent failed to hire the employees for reasons that are unlawful under the Act. We also note that no party objected to the introduction of any of the relevant evidence. This further supports our conclusion that the Section 8(a)(4) allegation is closely related to the Section 8(a)(3) allegation included in the complaint. Second, as the record recited and described above amply demonstrates, the Respondent's failure to hire these employees because of the filing of the instant charges was fully litigated. Indeed, the Respondent's own witness corroborated the General Counsel's witnesses and admitted that the employees were not hired

> because of the pending unfair labor practice charges. [Citations omitted.][4]

The warning issued to McGrath presents a different situation. As to that allegation, I credit the testimony of Daubresse regarding his assertion that after criticizing McGrath for spilling wine and taking the lobster order, McGrath acted in an insubordinate way by encompassing his response with an expletive. Thus, it is my opinion that the written warning which was issued to McGrath on September 12, was not motivated by his union activities.

The amended charges and the complaint also allege that the Respondent interrogated an employee, threatened to close and solicited grievances. The Respondent notes that the latter two allegations were put in the amended charges which were filed more than 6 months after the events allegedly occurred. The interrogation allegation is not contained in any of the amended charges. Accordingly, the Respondent asserts that these allegations are barred by the 6-month statute of limitations set forth in Section 10(b) of the Act.

In *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), the Board held that 8(a)(1) allegations in a complaint must be ''closely related'' to the allegations of the underlying charge and cannot simply be added by virtue of the boilerplate ''by these and other acts'' phrase contained at the bottom of every unfair labor practice charge. In *Redd-I, Inc*, 290 NLRB 1115, 1116 (1988), the Board in setting forth what would be considered closely related stated:

> In deciding whether complaint amendments are closely related to allegations in the charge, the Board and the courts have looked at whether the amendments are factually and legally related to the charge. In *National Licorice* the Supreme Court held that various complaint allegations were related to the charge when the violations alleged in the complaint were ''of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects.'' The Second Circuit has said that ''the complaint issued by the Board must deal with the same subject matter and sequence of events . . . although the specific events stated in the complaint may precede or follow those stated in the 'charge.''' Finally the Board has found complaint allegations closely related when they ''arise from the same factual situations are of the same class as, and clearly related to, the [allegations] . . . set forth in the charge.'' [Citations omitted.]

Where new allegations in a complaint are part of an ''overall plan to resist organization'' the courts have held that they are closely related. See *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. l970); *NLRB v. Central Power & Light Co.*, 425 F.2d l3l8, 1321 (5th Cir. 1970). For a comprehensive discussion of the closely related test, see *Red Food Store*, 252 NLRB 116, 117–124 (1980).

In my opinion the three allegations which were not part of the initial charge are closely related to the allegation of that charge. Thus, the initial charge alleged that the Respondent, on September 14, l989, discriminated against an employee because of his support and activities for the Union. The other allegations of interrogation, a threat to close and the solicitation of grievances all arise within a month or two of the initial allegation; are alleged to be part of the Company's response to the Union's organizational campaign; and are alleged to be actions taken by the Respondent to discourage employee union support. That is, although the alleged actions would constitute separate violations under Section 8(a)(1) of the Act if proven, they arise in essentially a single context and involve basically conduct which would be commonly motivated by a desire to convince employees to vote against the Union.

Based on the credited testimony of Jacques Williams, I find that on or about September 17, l989, Bouley asked him which of the kitchen employees were involved in union activity and stated that a union would be detrimental to the kind of restaurant that he wanted to run. In my opinion this constituted prohibited interrogation within the meaning of *Rossmore House*, 269 NLRB 1176 (l984), affd. 760 F.2d 1006 (9th Cir. l985).

I also conclude based on the credited testimony of Jay Cohen that Bouley threatened to close. It may be that this statement was made in a moment of frustration and was not perceived by Cohen as a threat. However, this does not militate against a finding that it constituted a violation of Section 8(a)(1) of the Act. *El Rancho Market*, 235 NLRB 468, 471 (l978). *Sagapo Restaurant*, 257 NLRB 1212, 1219 (1981).

As noted, the General Counsel also contends that the Respondent unlawfully solicited grievances from its employees. In my opinion, this allegation has not been proven.

In *Uarco Inc.*, 216 NLRB 1, 2 (1974), the Board in discussing whether the solicitation of grievances constituted a violation of Section 8(a)(l) of the Act stated:

> [I]t is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(l), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer. [Citations omitted.][5]

In the present case, the General Counsel adduced evidence that at a meeting before the election, the employer asked the employees to set forth their grievances, after which one or more employees asked about changing from a 6- to a 5-day schedule. Bouley's response, at most was that he had been working on this problem. In fact, the evidence shows that employees had been told that the company was trying to make a change to a 5-day schedule well before the Union's current organizing campaign and some of the more senior employees had been shifted to a 5-day schedule before this meeting. Although the General Counsel asserts that the employer changed the schedules of some of its employees after this meeting, this is not supported. One witness called by the General Counsel (Williams) said that a couple of unnamed employees moved to a 5-day schedule after the meeting. On

[4] In *Pergament*, supra, the Board rejected the employer's motion to reopen the record. I reject a similar motion to reopen the record in the present case.

[5] See also *Mariposa Press*, 273 NLRB 528, 529 (l984) (statements about an open door policy held not violative); and *Ace Hardware Corp.*, 271 NLRB 1174 (l984), where the Board held that the Respondent impliedly promised benefits in conjunction with the solicitation of grievances.

the other hand, another of the General Counsel's witnesses (Cohen) testified that no one's schedule was changed between the time of the meeting and the election.

In my opinion, the discussion of changing the work schedule, after Bouley asked the employees about their grievances, did not imply any new promise of benefit. Rather, this discussion was essentially a reiteration of an old promise made before the union campaign and involved a change which had been undertaken before any union activities commenced.

CONCLUSIONS OF LAW

1. By discharging David McGrath because he threatened to file charges, the Respondent has violated Section 8(a)(1) and (4) of the Act.

2. By interrogating an employee about the union activities of other employees, the Respondent violated Section 8(a)(1) of the Act.

3. By threatening to close the restaurant because of the Union, the Respondent violated Section 8(a)(1) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as found above, the Respondent has not violated the Act in any other manner encompassed by the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (l987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Bouley Inc., d/b/a Bouley, New York City, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for threatening to file charges under the National Labor Relations Act.

(b) Coercively interrogating any employee about union support or union activities.

(c) Threatening to close its business because of the employees' union activities or support.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer David McGrath immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify McGrath in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in New York City, New York copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[6] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''